

IN THE HIGH COURT OF SWAZILAND

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Swaziland Government

applicant

v

Thomas Mamba

respondent

In re Thomas Mamba

Plaintiff

v

Swaziland Government

Defendant

Case No. 2691/97

Coram

S.W. SAPIRE, A C J

Applicant

MISS GAMA

For Respondent

MR P.R. DUNSEITH

Judgment

(18/5/98)

This is an application for rescission of a judgement of this court in terms of which the Respondent was awarded damages in amount of E354 980,00 together with interest calculated at 9% per annum, and the costs of the suit. The judgment was granted by default in the absence of the Defendant, as no notice to defend had been given.

The action had been instituted by the Respondent, after he had successfully and without opposition from the Attorney general applied for an order in terms of Section 4 of the Limitation of Proceedings Against the Government Act of 1972, extending the time within which the notice of the intended action could be brought When the order was granted the period of two years after the cause of action arose, and within which

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the action had to be commenced, had not yet elapsed. The cause of action is alleged to have arisen on 18th March 1996 and it follows that in terms of the statute the action could not be commenced by the service of summons later than 17th March 1998.

The summons on which the judgment was given, contains an allegation that the statutory notice required by the act was given, and was signed on 12th September 1997. It appears from the imprint of the Registrar's stamp to have been filed in this court on 16th September 1997.

The summons was on the 2nd October 1997, according to a return made by the deputy sheriff of that date, delivered by the deputy sheriff Mr Rowberry, to one Alvinah Nzuna, a secretary of the Defendant at 3 Mbabane Treasury Offices, "being the company's principal place of business within Swaziland". To her, Alvinah Nzuna the Deputy Sheriff exhibited the original and explained the "nature and contents thereof

On the basis of this issue and "service " of the summons, there, not surprisingly, being no notice of intention to defend filed by the Attorney General on behalf of the Defendant, the Respondent, i.e. the Plaintiff, applied for default judgment. There are several reasons why this application should have been refused and why judgment should not have been entered. These reasons are

1. The citation of the defendant is incorrect
- 2 The service is irregular and ineffective.

I cannot view the judgment as would a court of appeal, but as it was granted in the absence of the defendant, such judgment, incorrectly granted, may be rescinded. In cases such as this there is no obligation on the Applicant to show a bone fide defence in order to establish good cause for the rescission

The Attorney General as applicant asserts, and this is not seriously disputed that he did not receive service of the document referred to in the return of the deputy sheriff. That the service did not comply with the rules is indisputable and the applicant is clearly entitled to rescission.

The Plaintiff however points out that the granting of rescission now will mean that the plaintiff will have to commence his action de nova. This in turn means that, as the previous service was ineffective, and proper service has not been effected, the action will have to be commenced by the service of the summons afresh.

Plaintiff's cause of action arose on 18th March 1996 and in terms of section

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2 of the Limitation of Legal Proceedings Act 1972 no legal proceedings shall be instituted against the Government in respect of any debt after the lapse of a period of twenty four months as from the day on which the debt became due (Sec2(1)(b)).

The Respondent / Plaintiff submits that in granting of rescission I should do so subject to such conditions as would protect him from the provisions of the time barring act in order that he may proceed with his action.

In this connection I was referred to a decision in the court of Appeal Sandile Dlamini v Attorney General Civil appeal No 32/97. The facts of the present case, are some what different, but what should be the approach of the Court is clearly indicated

The Act provides for the granting by the High Court of leave to a person debarred under section 2(1)(a) from instituting proceedings, to institute such proceedings, if certain specified conditions are fulfilled. This power is not granted to the High Court to grant relief, to a would be plaintiff who is barred in terms of the provisions of section 2(1)(c).

Unlike in the case cited, in the present case a summons instituting action against the government was indeed served by the plaintiff after an application for relief in terms of the act had been made on notice to the Attorney General who had decided not to oppose the granting of the relief claimed. The Attorney General certainly had notice of the intended action and in his own words, eagerly awaited service of the summons It is true that service of the summons was not effected as provided for in the rules of court. This did not make the service itself invalid, or a nullity. The court has the power to condone irregular service

where as in this case it is satisfied that knowledge of the summons has come to the Defendant. The rules of court are made to ease and regulate the doing of justice between litigants and are not to be applied to negate this very end

I will accordingly rescind the judgement and condone the irregular service of the summons. The order I make is as follows

- The judgment granted by default, against the Applicant in this matter is rescinded and set aside
- The irregularities in the service of the summons are condoned, and the summons is declared to have been validly served on the defendant in terms of the deputy sheriff's return.
- The Applicant may give notice of intention to defend within seven days of the granting of this order, whereafter the provisions of the rules as to the

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requesting of particulars, the filing of pleadings, and the preparation for trial are to be followed

The wasted costs occasioned by the irregular service of the summons, and all proceedings following thereon or arising therefrom are to be paid by the Respondent/ Plaintiff

S.W. SAPIRE

ACTING CHIEF JUSTICE